

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rig Telephones, Inc. d/b/a Datacom)
)
Request for Waiver of Part 101 of the)
Commission's Rules)
)
)
Cellular Services and Other Commercial)
Mobile Radio Services in the Gulf of)
Mexico)
_____)

WT Docket No. 97-112

To: The Wireless Telecommunications Bureau

COMMENTS OF SPRINT SPECTRUM, L.P., d/b/a SPRINT PCS

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Table of Contents

Summary of Comments.....	2
Background Facts	3
Interference Problems in the Gulf Region.....	8
Argument: The Bureau Should Reconsider its <i>Datacom Authorization Order</i>	9
A. The Bureau Should Not Have Considered Datacom's Request Until Datacom Had Completed Frequency Coordination	9
B. Datacom's Request Constituted a Major Amendment to Its License and Public Notice Was Therefore Required	11
C. Datacom Has Not Demonstrated Any Need to Use the PCS Band to Provide Common Carrier Services	12
Conclusion	16

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To: The Wireless Telecommunications Bureau

COMMENTS OF SPRINT PCS

Sprint Spectrum, L.P., d/b/a Sprint PCS ("Sprint PCS") has paid over \$360 million for coastal PCS licenses authorizing it to provide CMRS within the Gulf of Mexico and has paid another \$3.4 million in relocating microwave facilities in the Gulf.¹ Sprint PCS therefore agrees with the petitions that have been filed requesting the Wireless Bureau to reconsider its September 1, 1998 order authorizing Rig Telephones d/b/a Datacom ("Datacom") to use *for free* the *same* spectrum in the *same* Gulf area apparently to provide the *same* CMRS.² Datacom

¹ Sprint PCS holds 12 coastal PCS licenses: Miami MTA 15-A; New Orleans MTA 17-A; San Antonio MTA 33-A; Beaumont BTA 34D; Gainesville BTA 159-D; Houston BTA 196-D; Lake Charles BTA 238-D; Panama City BTA 340-E; Sarasota BTA 408-D; Tallahassee BTA 439-D; Tampa BTA 440-D; and Victoria BTA 456-D.

² See *Rig Telephones, Inc. d/b/a Datacom, Request for Waiver of Part 101 of the Commission's Rules, Order*, DA 98-1739 (Sept. 1, 1998) ("*Datacom Authorization Order*"); *Petition for Partial Reconsideration of Aerial Communications, Inc. and Western PCS BTA I Corporation* (Oct. 1, 1998) ("*Aerial/Western Petition*"); *Petition for Reconsideration of Shell Offshore Services Company* (Sept. 30, 1998) ("*Shell Petition*"). See also *Petroleum Communications Petition for Clarification* (Sept. 25, 1998).

should have no right to use for free the same spectrum that Sprint PCS and other PCS licensees have already paid substantial license fees. In addition, there is a high likelihood that Datacom's proposed PCS system will cause harmful interference to Sprint PCS's current CMRS operations, to the detriment of its customers and the public interest.

Summary of Comments

Sprint PCS demonstrates below that the Bureau should vacate the *Datacom Authorization Order*. First, in direct violation of Commission rules, Datacom failed to complete necessary frequency coordination prior to filing its request, and the Bureau should have not even considered the request until this work was completed. Although it is Datacom that has the burden of documenting that its proposed system will not cause harmful interference to operational PCS systems which paid for the right to use the spectrum, Sprint PCS demonstrates that there is a high likelihood that Datacom's proposed system will, in fact, cause harmful interference to Sprint PCS's system.

Second, the Communications Act requires that a major modification to an existing license such as Datacom's request must be subject to public notice. The failure to publish such a notice concerning Datacom's request rendered the *Order* procedurally infirm and deprived Sprint PCS and others from exercising their statutory right to file a petition to deny. Congress specifically adopted this public notice requirement so that "parties in interest will have an opportunity to show the Commission that it is about to make a mistake against the public interest."³

Finally, Datacom has failed to justify the extraordinary relief it seeks. If Datacom wants to provide CMRS or other common carrier services in the Gulf, it should be required to

³ *Valley Broadcasting v. FCC*, 237 F.2d 784, 787 (D.C. Cir. 1956).

acquire spectrum like all other entities — whether by obtaining spectrum in an auction or by negotiating a partitioning agreement with one or more existing licensees. In no event should Datacom be permitted to provide competing common carrier services without operating under the same set of rules applicable to all other licensees. The *Authorization Order* gives Datacom an unfair competitive advantage in the market; it impairs the value of existing licenses; and it will undermine the valuation process in future spectrum auctions.

Background Facts

The Commission has adopted different approaches for the provision of commercial mobile radio services (“CMRS”) in the Gulf of Mexico. For cellular service, it established a separate service area for the Gulf.⁴ This decision, however, has resulted in numerous and continuing conflicts and interference problems with coastal cellular licensees — problems that remain unresolved even today and problems that have influenced the Commission’s subsequent Gulf licensing policies.⁵

Familiar with the long-standing disputes in the cellular context resulting from having different licensees serving the surrounding land and water areas of the Gulf, the Commission adopted a different approach in establishing service areas for personal communications services (“PCS”). For PCS, the Commission determined that service in the Gulf should be provided by PCS licensees acquiring MTA and BTA licenses along the Gulf coast rather than by

⁴ See *Petroleum Communications*, 54 R.R.2d 1020 (1983). A separate Gulf cellular serving area was deemed necessary because “[w]ater areas were specifically excluded from MSA areas from the inception of cellular application licensing.” *Petroleum Communications*, 3 FCC Rcd 399 ¶ 5 (1988).

⁵ For a history of these ongoing disputes, see *Cellular Service and Other CMRS in the Gulf of Mexico*, WT Docket No. 97-112, *Second Further NPRM*, 12 FCC Rcd 4576, 4579-89 ¶¶ 5-26 (April 16, 1997) (“*Cellular Gulf Licensing NPRM*”).

separate Gulf licensees. As the Commission later confirmed before Sprint PCS and others entered the 10 MHz (D, E, and F block) PCS auction:

[U]nlike cellular mobile service, there is no PCS licensee for the water areas of the Gulf of Mexico. Entities eligible to serve the Gulf of Mexico are the licensees of BTAs bordering on the Gulf.⁶

The Commission adopted yet a third approach for Wireless Communication Service ("WCS").⁷ For this service, the Commission decided to establish a separate licensed WCS service area covering the Gulf — as had been done with cellular service (but not with PCS).⁸ However, unlike cellular Gulf service areas, the Commission further determined that WCS Gulf licenses should not include that portion of the Gulf 12 miles from the shoreline; this coastal water zone would instead be served by WCS licensees obtaining coastal licenses.⁹

Datacom is an offshore telecommunications common carrier that provides telecommunications services in and around the Gulf.¹⁰ Datacom wants to transport and apparently to provide CMRS in the Gulf,¹¹ and it entered the WCS auction in an attempt to acquire addi-

⁶ *Mobile Oil Telcom*, 11 FCC Rcd 4115, 4116 n.10 (WTB, April 10, 1996). PCS licensees were therefore taken by surprise when the very next year the Commission stated: "At this point, no provision has been made for the licensing of broadband or narrowband PCS in the Gulf." *Cellular Gulf Licensing NPRM*, 12 FCC Rcd at 4599 ¶ 60. In response, Sprint PCS and others demonstrated that their PCS licenses already included the right to serve the Gulf and that since they had paid a premium for this Gulf coverage, their licenses could not be modified by excluding the Gulf. See, e.g., Sprint PCS Comments (July 2, 1997); Sprint PCS Reply Comments (Aug. 4, 1997). Shell is therefore mistaken in assuming that there will be a "forthcoming auction of [PCS] spectrum in the" Gulf. Shell Petition at 15 ¶ 24. See also *id.* at 21 ¶ 35.

⁷ *Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785 (Feb. 19, 1997).

⁸ *Id.* at 10186 ¶ 59.

⁹ *Id.*

¹⁰ See, e.g., *Shell Offshore*, 11 FCC Rcd 10119, 10120 ¶ 4 (Aug. 29, 1996).

¹¹ See Datacom Waiver Request at 7 (Jan. 19, 1998); Datacom STA Request at 3 (July 2, 1998).

tional spectrum.¹² However, Datacom's effort to obtain spectrum at the auction were unsuccessful; all four Gulf WCS licenses were instead acquired by Shell Offshore, one of Datacom's competitors.¹³

Another way Datacom could have acquired spectrum in the Gulf was to negotiate a partitioning agreement with PCS licensees authorized to serve the Gulf, an approach it did not pursue to Sprint PCS's knowledge.¹⁴ Instead, Datacom decided that it would attempt to acquire spectrum in the PCS band by obtaining a private license while convincing the Commission to waive the prohibition on private licensees from offering common carrier services.¹⁵ Datacom chose to pursue this course even though the Commission has made clear that with the reallocation of the 1850-1990 MHz band to PCS, new non-PCS operations in the PCS band would not be encouraged.¹⁶

Ordinarily, one acquires additional spectrum in a new band — here, the 1850-1990 MHz PCS band — by filing a license application. Datacom did not pursue this settled-procedure. Rather, on January 19, 1998 Datacom submitted a letter asking the Private Wireless Division to:

1. Modify its temporary fixed authority in the Gulf (call sign KYC56) to include the entire PCS band — that is, the same spectrum PCS licensees had already paid for; and

¹² See *Public Notice*, 12 FCC Rcd 21177 (April 10, 1997). In contrast, Datacom chose not to participate in the PCS auctions to acquire licenses to provide PCS in the Gulf.

¹³ *Public Notice*, 12 FCC Rcd 21653, 21663-65 (April 28, 1997).

¹⁴ See 47 C.F.R. § 24.714.

¹⁵ See 47 C.F.R. § 101.603(b)(1) ("Stations licensed in this radio service shall not render a common carrier communications service of any kind.").

¹⁶ See *Microwave Relocation Plan Reconsideration Order*, 8 FCC Rcd 6589, 6612 ¶ 55 (1993) ("Our policy allows for the continued use of the 2 GHz bands by *incumbent* licensees until the bands are needed by new services Allowing unrestricted fixed microwave growth in the 2 GHz bands would restrict use of these bands in the future by new services.") (emphasis added).

2. Waive the Rule 101.603(b) prohibition on private licenses in the PCS band from offering common carrier services — so it could provide the same services PCS licensees were already authorized to provide.¹⁷

Datacom argued that its expanded authorization request was appropriate because there was “little likelihood that the spectrum will ever be used for PCS systems” in the Gulf and that Datacom had no alternatives to provide its proposed new “cellular” services.¹⁸

Even ignoring the fact that PCS licensees had already paid for the spectrum Datacom sought to use, Datacom’s request constituted a major modification of a license for which public notice was required.¹⁹ However, perhaps due to the informality of Datacom’s letter request, the Private Wireless Division did not publish a public notice concerning Datacom’s request. In any event, Sprint PCS was not given notice of this request — a request that affects Sprint PCS’s legal rights to use PCS spectrum it paid for — until the Private Wireless Division released its September 1, 1998 *Order* approving it.²⁰

¹⁷ Datacom also asked for a waiver of the 3.5 MHz bandwidth restriction for 2110-2130 and 2160-2180 MHz bands so that it could triple its capacity in this band. See Letter from Nick Pugh, Datacom President, to Mary Schulz, FCC Gettysburg, at 3-6 (Jan. 19, 1998) (“Datacom Waiver Request”).

¹⁸ *Id.* at 9. Datacom eventually did file an associated license modification application, but it appears that its initial application was rejected for procedural irregularities. See *Wireless Telecommunications Bureau Weekly Receipts and Disposal*, Report No. 1983, No. 9705976 (April 7, 1998). On July 2, 1998 Datacom filed a letter request for Special Temporary Authority to begin using the PCS band in the provision of common carrier services. See Letter from Nick Pugh, Datacom President, to STA Processing Technical and Licensing Branch (July 2, 1998) (“Datacom STA Request”). This request did not begin to meet the requirements for grant of an STA. See, e.g., 47 U.S.C. § 101.31(a)(2). Moreover, in direct violation of the rules, Datacom did not include a “[c]ertification that prior coordination is complete,” Datacom instead asserting that “formal frequency coordination is neither necessary nor practical.” Compare 47 C.F.R. § 101.31(a)(5)(xiii) with Datacom STA Request at 5.

¹⁹ See 47 U.S.C. § 309(b) (requiring public notice for “any substantial amendment” to a license). See also 5 U.S.C. § 558(c); 47 C.F.R. § 101/37(a).

²⁰ As Aerial and Western have explained, the public notice the Commission published on August 4, 1998 did not give the public adequate notice of Datacom’s January 19, 1998 request. See *Aerial/Western Petition* at 2 n.5. Indeed, it is not apparent that the Commission could grant this latter request to use the entire PCS band throughout the entire United States. See 47 C.F.R. § 101.103(a) (“[E]ach frequency available for use by stations in these services will be assigned exclusively to a single applicant in any service area.”). In addition, as Aerial and Western have noted, this license grant is void because the Commission

In granting the request without benefit of public comment, the Private Wireless Division accepted the Datacom's arguments at face value, stating:

[W]e believe Datacom has demonstrated unique circumstances and the lack of reasonable alternatives to support its request for a waiver to allow common carrier traffic on the 1850-1990 MHz band in the deep water of the Gulf.²¹

However, the Private Division granted Datacom its requested relief using a different procedure than what Datacom had proposed:

Since Datacom is already licensed as a common carrier, we believe the best approach here is to waive Section 101.101 to allow Datacom to modify its existing license to add the subject band rather than require Datacom to obtain another license (in this case a private license) and waive Section 101.603(b) as well as other rule sections. We believe that this approach would save Commission resources as well as those of Datacom²²

Curiously, the *Order* made no reference to the Gulf licensing rulemaking that remains pending.²³

The *Order* appears to authorize Datacom to offer *any* common carrier services (e.g., CMRS) in *all* 140 MHz of spectrum allocated to PCS — including the 20 MHz of unlicensed PCS spectrum.²⁴ The only limitations imposed on this broad license grant were that Datacom's use of this 140 MHz of spectrum was limited to the undefined area, "the deep water of the Gulf," and that its use of this band was on a secondary basis to PCS licenses.²⁵ It therefore

granted the application before the expiration of the 30-day period prescribed in 47 U.S.C. § 309(b). See Aerial/Western Petition at 8.

²¹ *Datacom Authorization Order* at 4 ¶ 11.

²² *Id.*

²³ See *Cellular Gulf Licensing NPRM*, note 5 *supra*.

²⁴ See *Datacom Authorization Order* at 4-5 ¶ 12 ("This *Order* also allows Datacom to modify its license KYC56 to add 1850-1990 MHz [band] for use in the deep water of the Gulf."). But see Rule 101.101(a) quoted above.

²⁵ *Id.*

appears that with this new authorization, Datacom may now offer PCS and other CMRS using the same PCS spectrum that Sprint PCS and others have already paid for.

Interference Problems in the Gulf Region

The provision of radio services in the Gulf region, the Commission has acknowledged, poses "unique challenges."²⁶ This is because propagation characteristics across water are "unpredictable and more extensive than contours over land areas."²⁷ In addition to the fact that PCS signals travel well over water, licensees in the Gulf region face a phenomenon commonly known as "ducting."²⁸ Caused by temperature inversions, ducting can result in a 1.8/1.9 GHz PCS signal travelling significant distances — up to 10 times further than under normal atmospheric conditions. The problem with ducting is that it occurs for a relatively short duration, making it very difficult to identify the carrier generating the signal and to troubleshoot with that carrier to resolve the interference.

As the Commission knows, Sprint PCS and other CMRS licensees currently serve the population centers and highways that are located on the Gulf coast. To serve these areas adequately, CMRS licensees must transmit both inland and Gulfward, and this, in turn, makes their licensed systems especially vulnerable to interfering signals transmitted from the Gulf. This interference problem is particularly acute for licensees using advanced CDMA technol-

²⁶ See *Cellular Gulf Licensing NPRM*, 12 FCC Rcd at 4583 ¶ 13.

²⁷ See *Unserved Cellular Service Area NPRM*, 6 FCC Rcd 6158, 6160 ¶ 14 (1991). See also *Petroleum Communications*, 2 FCC Rcd 3695, 3597 ¶ 17 (1987) (noting the "greatly increased propagation in the Gulf area.").

²⁸ Ducting refers to a situation where the signal becomes trapped between the water and a thermal inversion layer. See generally *Allocation of the 219-220 MHz Band*, 10 FCC Rcd 4446, 4450 n.43 (1995); *Amendment of Section 73.202(b)*, 10 FCC Rcd 2149, 2150 n.6 (1995); *Amendment of Section 73.606(b)*, 7 FCC Rcd 5601 n.4 (1992).

ogy.²⁹ Indeed, it was because of these kinds of problems that Sprint PCS has already expended over \$3.4 million in relocating point-to-point microwave facilities in the Gulf.

As a result of these serious and unique problems in the Gulf region, the Commission has declared that Gulf licensees "have the duty to ensure frequency coordination with the land systems,"³⁰ and "must take whatever action is necessary to give [coastal licensees] interference-free operation."³¹

Argument: The Bureau Should Reconsider its *Datacom Authorization Order*

There are numerous reasons why the Bureau should reconsider its September 1, 1998 *Datacom Authorization Order* in addition to the fact that Sprint PCS and other PCS licensees have already paid for the right to use the same spectrum in the same Gulf area.

A. The Bureau Should Not Have Considered Datacom's Request Until Datacom Had Completed Frequency Coordination

Commission Rule 101.103(d) specifies that the Bureau may consider an authorization application only if the applicant completes frequency coordination "prior to filing an application."³² Rule 101.103(d)(1) provides in relevant part:

Proposed frequency usage *must* be prior coordinated with existing licensees . . . whose facilities could . . . be affected by the new proposal in

²⁹ CDMA systems can receive signals at or near the noise floor. CDMA works by spreading all signals across the same broad frequency band and assigning a unique code to each traffic channel. The dispersed signals are discerned by the receiver by synchronizing with the base transmitter code. This dispersal of signals over a broad frequency band results in a relatively low energy per Hertz. Accordingly, CDMA is much more susceptible to interference than other technologies such as TDMA that do not spread all signals across a broad frequency band, given that the CDMA signals are closer to the noise floor.

³⁰ See *Petroleum Communications*, 1 FCC Rcd 511, 516 n.16 (1986).

³¹ See *Petroleum Communications*, 2 FCC Rcd 3695, 3697 ¶ 18 (1987).

³² See also *New Licensing Rules NPRM*, 13 FCC Rcd at 9694 ¶ 49 ("[S]ection 101.103(d) of our rules requires all applicants seeking to amend applications or modify their authorizations to obtain a new frequency coordination.")(emphasis added).

terms of frequency interference on active channels, applied-for channels, or channels coordinated for future growth. Coordination *must be completed prior to filing an application* for regular authorization or an amendment to a pending application, or any major modification to a license.³³

As noted above, 1.8 GHz microwave systems in the Gulf of Mexico can and do cause interference to PCS systems, not only in the Gulf but also in the land areas along the coast. Indeed, Sprint PCS has already paid over \$3.4 million to relocate Gulf microwave systems to other bands. Sprint PCS believes there is a high likelihood that Datacom's proposed system could cause harmful interference to its PCS systems and, as a secondary licensee, Datacom has the legal obligation to ensure that its system does not cause interference to Sprint PCS's systems.³⁴

Datacom's January 19, 1998 request for authorization does not even allege that Datacom commenced prior frequency coordination with respect to its proposed use of the PCS band.³⁵ Consequently, the Bureau should not have entertained Datacom's request — and it should not entertain any new requests until Datacom documents compliance with Rule 101.103(d).

Not only has Datacom failed to meet the Commission's rules, it has shown an utter disregard for these rules. Commission rules are clear and unequivocal: one seeking to use a frequency subject to Part 101 "must" engage in formal prior frequency coordination and "must"

³³ 47 C.F.R. § 101.103(d)(1)(emphasis added).

³⁴ See, e.g., 47 C.F.R. § 2.104(d)(4)(i) ("Stations of a secondary service . . . [s]hall not cause harmful interference to stations of primary or permitted services to which frequencies are already assigned or to which frequencies may be assigned at a later date.").

³⁵ Similarly, Datacom's July 1998 STA request also failed to include the required certification that it had completed prior frequency coordination. See note . . . *supra*.

follow the detailed procedures prescribed in the rules.³⁶ Nevertheless, Datacom takes the position that, in *its* judgment, "formal frequency coordination is neither necessary nor practical" because, in *its* judgment, it "does not expect to encounter any frequency conflicts."³⁷

This response is unacceptable. Datacom's personal opinions do not warrant disregarding explicit Commission rules and requirements. Moreover, Datacom's opinion that *it* will not encounter interference on its system misstates the issue; for a secondary licensee like Datacom, the question rather is whether Datacom has adequately documented that its proposed system "shall not cause harmful interference to stations of primary or permitted services."³⁸ Finally, Datacom's unsupported and self-serving opinions are simply wrong. It asserts that there will be no harmful interference because its transmitters will be located 90 miles from the Gulf shoreline.³⁹ Yet, the record before the Commission already demonstrates that interference problems have required PCS licensees to relocate microwave systems beyond that distance from the shore.⁴⁰

B. Datacom's Request Constituted a Major Amendment to Its License and Public Notice Was Therefore Required

Section 309(b) of the Communications Act prohibits the Commission from granting a license "earlier than thirty days following issuance of public notice by the Commis-

³⁶ See 47 C.F.R. § 101.103(d).

³⁷ Datacom STA Request at 5.

³⁸ 47 C.F.R. § 2.104(d)(4)(i).

³⁹ See Datacom April 8, 1998 Supplement to Request at 1 ("The system that DATACOM seeks to establish will be located in the deep water approximately 150 miles from Houston, TX."). Houston is approximately 60 miles from the Gulf coast.

⁴⁰ See Comments filed in the WT Docket 97-112 rulemaking, and PrimeCo's recent *ex parte*. Letter from Luisa L. Lancetti, Wilkinson, Barker, Knauer & Quinn (for PrimeCo), to Margalie R. Salas, FCC Secretary, WT Docket No. 97-112, Attachment (Oct. 7, 1998),

sion of the acceptable for filing of such application or of any substantial amendment thereof.”⁴¹ Congress adopted this public notice requirement so that “parties in interest will have an opportunity to show the Commission that it is about to make a mistake against the public interest.”⁴²

Datacom’s January 19, 1998 request unquestionably constituted a “substantial amendment” to its existing license (call sign KCY56).⁴³ Among other things, Datacom sought to add an entirely new spectrum band — the 1850-1990 MHz PCS band that others had already paid for — to its license, and it requested a waiver from Rule 101.603(b) so it could use this new band in the provision of common carrier services. The failure to provide public notice of this request as required by Section 309(b) renders the authorization void.⁴⁴

C. Datacom Has Not Demonstrated Any Need to Use the PCS Band to Provide Common Carrier Services

Commission Rule 101.603(b) prohibits non-PCS licensees from using the 1850-1990 MHz PCS band in the provision of “a common carrier communications service of any

⁴¹ 47 U.S.C. § 309(b). *See also* 47 C.F.R. § 101.37(c) (“[N]o application that has appeared on public notice will be granted until the expiration of a period of thirty days following the issuance of the public notice listing the application, or any major amendment thereto”); *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7988, 8146 ¶ 358 (1994) (“[U]nder Section 309 all major filings are subject to a 30-day public notice period and petitions to deny. This would include initial applications, major amendments, and major modifications.”).

⁴² *Valley Broadcasting v. FCC*, 237 F.2d 784, 787 (D.C. Cir. 1956).

⁴³ Datacom’s request would remain a major modification even under the new rule definitions the Commission is considering. *See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 NPRM*, 13 FCC Rcd 9672, 9689 ¶ 38 (March 18, 1998) (proposed definition of major amendment to include “[a]ny addition or change in frequency.”) (“*New Licensing Rules NPRM*”).

⁴⁴ In addition, the grant of Datacom’s license modification before the 30 day waiting period renders the license void as well. *See* note 20 *supra*.

kind."⁴⁵ Because it wants to build a new network using the PCS band to transport CMRS and apparently to provide CMRS, Datacom requested that the Bureau waive this rule prohibition.⁴⁶

It is axiomatic that a petitioner seeking a waiver of a rule "faces a high hurdle even at the starting gate."⁴⁷ Specifically, an applicant must demonstrate "reasons why in the public interest the rule should be waived."⁴⁸

[A] request for waiver . . . must affirmatively demonstrate that application of the rules would frustrate the underlying purposes of the rule.⁴⁹

Moreover, "[t]he agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application to put future parties on notice as to its operation."⁵⁰ Datacom has utterly failed to meet this stringent legal standard.

Datacom, in seeking a waiver to provide common carrier services in the PCS band, has asserted that there was no alternative to this band for the provision of such services and that, except for itself, there was little likelihood that the band would be used for PCS.⁵¹ Neither argument passes muster.

⁴⁵ 47 C.F.R. § 101.603(b)(1). In addition, an applicant for a private license under Part 101 must establish that there exist "frequencies *available* to engage the applicant to render a satisfactory service" and that "[t]he public interest, convenience, and necessity would be served by a grant thereof." 47 C.F.R. § 101.701(a)(2) and (3)(emphasis added).

⁴⁶ Datacom cannot avoid meeting the established legal standard for obtaining a waiver simply because the Bureau, in the name of expediency, decided to reach the same result using a different procedure.

⁴⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁴⁸ *FPC v. Texaco*, 377 U.S. 33, 39 (1964).

⁴⁹ *David Lausten*, 3 FCC Rcd 2053, 2054 ¶ 13 (1988).

⁵⁰ *Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁵¹ See *Datacom Authorization Order* at 4 ¶ 10.

Datacom's "no alternative" argument is not persuasive. Its existing license (call sign KYC56) already authorizes Datacom to transport common carrier communications in both the 2.1 GHz and the 6 GHz bands.⁵² While Datacom asserts that unspecified "weather conditions . . . severely limit the transmission capability at 6 GHz,"⁵³ Shell Offshore has pointed out that its 6 GHz Gulf system has been "highly reliable" and has performed up "to the 99.999% availability design criteria in all seasons."⁵⁴ Given this fact, it appears that *if* Datacom is encountering a problem with its current 6 GHz system, the problem may very well be due to the equipment it is using or the system's design — rather than the adequacy of the 6 GHz band.⁵⁵

Moreover, even if its concerns about its 6 GHz system were legitimate, Datacom fails altogether to allege that its 2.1 GHz system is inadequate for transporting its proposed common carrier/cellular traffic. Particularly given that Datacom also asked for (and was given) authority to triple the capacity of its 2.1 GHz system, it is extremely doubtful that Datacom also "requires" use of the 1.8 GHz PCS band to transmit common carrier communications in the Gulf.⁵⁶ Given these facts, Sprint PCS must conclude that Datacom wants access to the 1.8 GHz PCS band so it can provide commercial mobile radio services, rather than simply transporting common carrier telecommunications over its microwave systems.

⁵² See Datacom Request at 1-2 and n.2.

⁵³ *Id.* at 4.

⁵⁴ Shell Petition at 8 ¶ 13 (emphasis in original).

⁵⁵ Moreover, Datacom has not documented that it is actually encountering a problem. The only fact it presents in support of its alleged problem is its statement that its 6 GHz system was down for a total of two hours. But as Shell Offshore points out, a total of two hours of outage time since 1992 does not indicate that a 6 GHz system is unreliable. See Shell Petition at 8 ¶ 12.

⁵⁶ Datacom Request at 7.

Equally unavailing is Datacom's argument, entirely unsupported and self serving, that in its judgment there is little demand for PCS in the Gulf.⁵⁷ At the outset, the Bureau does not have the factual record in which to accept this unsupported Datacom argument, given that the Commission has pending a proceeding examining this very question.⁵⁸

More fundamentally, Datacom's own perceived demand for PCS/CMRS services in the Gulf is irrelevant. As demonstrated above, Sprint PCS and other firms holding coastal PCS licenses already have the right to provide CMRS in the Gulf using the 1.8 GHz PCS band. If Datacom wants to provide CMRS in the Gulf, it should acquire the necessary spectrum in the same manner followed by all other CMRS licensees — that is, acquire spectrum in an auction or negotiate a partitioning agreement with one or more current PCS licensees.

As Shell points out, the Bureau's *Order* "provides Datacom with a competitive advantage *vis-à-vis* entities that have obtained, or will have to obtain such licenses at auction."⁵⁹ In addition, the *Order* authorizes Datacom to use for free the very same spectrum that Sprint PCS and other carriers have paid for. Consequently, the *Order* "creates serious doubt regarding the wisdom of participating in future auctions if the Commission will subsequently undermine the value of such licenses by granting parties unjustified waivers of the Commission's rules."⁶⁰

⁵⁷ See *Datacom Authorization Order* at 4 ¶ 10. Datacom's additional reliance on "past Commission actions" (*id.*) is of no probative value given that the decisions recited all pre date the reallocation of the 1.8 GHz band to PCS and the subsequent auction of PCS licenses.

⁵⁸ See *Cellular Gulf Licensing NPRM*, 12 FCC Rcd at 4599-4600 ¶ 60 ("We request comment on whether sufficient demand exists to justify an extension of broadband and narrowband PCS services into the Gulf of Mexico.").

⁵⁹ *Shell Petition* at 4 ¶ 7.

⁶⁰ *Id.* at 14 ¶ 23.

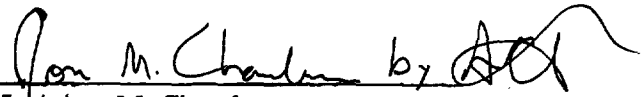
Conclusion

For the foregoing reasons, Sprint PCS respectfully requests that the Bureau reconsider its September 1, 1998 *Datacom Authorization Order*.

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CERTIFICATE OF SERVICE

I hereby certify on that on this 16th day of October, 1998, I served a copy of the foregoing comments by U.S. first-class mail, or by hand delivery as indicated with an *, to the following persons:

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